Note: While NSPE Board of Ethical Review opinions are usually unanimously, occasionally the Board issues a "majority" and "minority" opinion. However, BER Opinion No. 00-6 resulted in a 3-3 split with neither opinion claiming a majority or minority of Board members. While there are seven members appointed to the Board, in March 2001 NSPE Board of Ethical Review Member Paul Pritzker, P.E., F.NSPE passed away leaving the 3-3 split. The Board thereafter considered its options and decided to issue the two opinions to illustrate the different perspectives that sometimes arise in ethical matters.

EXPERT WITNESS FORMERLY FOR UTILITY NOW TESTIFYING FOR CONSUMER

OPINION #1

Case No. 00-6

Facts:
State Electric Light Company Inc. (SELCI) is a privately owned electric utility company. SELCI had previously hired directly and indirectly several times via its parent company an electrical engineer consultant to do studies for the utility. This consultant, Engineer B, is now testifying for Consumer X, a party that has filed a complaint to the State Public Utilities Commission (SPUC) against SELCI.

Question:
Would it be ethical for Engineer B to testify for a party that has filed a complaint with the State Public Utilities Commission against SELCI?

References:

Section I.2.	-	*Code of Ethics:*	*Perform services only in areas of their competence.*
Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*
Section III.4.	-	*Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*
Section III.4.b.	-	*Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.*

Discussion:
Conflicts of interest are among the most fundamental issues faced by engineers. As consultants and in other professional capacities, engineers are called upon by different clients, both public and private, to render professional judgment and guidance in a variety of contexts. Oftentimes, an engineer may be faced with relationships and circumstances where the engineer is advising a current or former client in one context and that client's adversary in another context.

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This fundamental issue was raised in BER Case No. 82-6. In that case, Engineer A was retained by the U.S. government to study the causes of a dam failure. Later Engineer A was retained by the contractor on this project, who had filed a claim against the U.S. government for additional compensation. In ruling that Engineer A's actions were inconsistent with the NSPE Code of Ethics, the Board, citing NSPE Code Section III.4.b., noted that there was nothing in the record to indicate that Engineer A was given the consent of his former client, the U.S. government, to represent the interests of the contractor in its claim against the government for additional compensation. In addition, the expert testimony offered by Engineer A in a legal proceeding would constitute "particular, specialized knowledge gained on behalf of a former client or employer." As an expert witness, Engineer A would be required to state his opinion based upon his firsthand knowledge and on facts of record. The Board noted that there would be a danger that Engineer A's opinions, based on his firsthand knowledge and his understanding of the facts of record, would touch upon privileged, specialized, and confidential knowledge gained while he was retained by the U.S. government. Indeed, Engineer A could be called upon to give an opinion as to the very facts with which Engineer A was involved as a consultant with the government. Said the Board, "there can be no doubt that NSPE Code Section III.4.b. was enacted to prevent engineers from disclosing such information. For those reasons, we find that it would not be ethical for an engineer who was retained by the U.S. government to be retained as an expert witness for a contractor who filed a claim against the U.S. government for additional compensation."

Specifically, with regard to the fact and circumstances in the present case, the Board believes that the discussion of BER Case No. 82-6 is instructive, but not controlling. BER Case No. 82-6 specifically involved facts that suggested that the contractor's claim related specifically to the dam failure investigated for the government by Engineer A. In contrast, the facts in the present case indicate that Engineer A had conducted a series of studies and reports that may or may not have related to the complaint filed by Consumer X. In this connection, the Board's opinion in this matter would therefore turn on whether Engineer B is testifying on an issue involving special facts, confidential information, business affairs, technical processes, etc., that Engineer B learned about while employed as a consultant to the company. For example, if Engineer B is being asked to provide services or testify for Consumer X about issues relating to the studies she prepared for the SELCI, there would clearly be a conflict, or at the very least, the perception of a possible conflict. In contrast, the mere fact that Engineer B worked at one time in the past as a consultant to SELCI and is now testifying on a different set of issues would not necessarily raise an ethical concern. In view of the fact that there does not appear to be anything in the facts presented to suggest that Engineer B is being asked to testify for Consumer X on a study or other specific work or services Engineer B provided for SELCI, the Board cannot conclude that such actions would constitute unethical conduct by Engineer B.

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Conclusion:

It would be ethical for Engineer B to testify for a party that has filed a complaint with the State Public Utilities Commission (SPUC), assuming that Engineer B is not being asked to testify about issues relating to the studies she prepared for the SELCI.

BOARD OF ETHICAL REVIEW
Lorry T. Bannes, P.E., NSPE
John W. Gregorits, P.E., F.NSPE
Louis L. Guy, Jr., P.E., F.NSPE

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Each opinion is intended as guidance to individual practicing engineers, students and the public. In regard to the question of application of the NSPE Code to engineering organizations (e.g., corporations, partnerships, sole-proprietorships, government agencies, university engineering departments, etc.), the specific business form or type should not negate nor detract from the conformance of individuals to the NSPE Code. The NSPE Code deals with professional services -- which services must be performed by real persons. Real persons in turn establish and implement policies within business structures.

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EXPERT WITNESS FORMERLY FOR UTILITY
NOW TESTIFYING FOR CONSUMER

OPINION #2

Case No. 00-6

Question:
Would it be ethical for Engineer B to testify for a party that has filed a complaint with the State Public Utilities Commission against SELCI?

References:

Section I.2.	-	*Code of Ethics:*	*Perform services only in areas of their competence.*
Section II.4.	-	*Code of Ethics:*	*Engineers shall act for each employer or client as faithful agents or trustees.*
Section II.4.a.	-	*Code of Ethics:*	*Engineers shall disclose all known or potential conflicts of interest which could influence or appear to influence their judgment or the quality of their services.*
Section III.4.	-	*Code of Ethics:*	*Engineers shall not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client or employer, or public body on which they serve.*
Section III.4.b.	-	*Code of Ethics:*	*Engineers shall not, without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client or employer.*

Discussion:
Specifically, with regard to the facts and circumstances in the present case, we believe the discussion of BER Case No. 82-6 is instructive. In Case No. 82-6, the BER found that Engineer A was not ethical in not securing the consent of his former client before appearing as an adversary in a proceeding against his original client (Code of Ethics, Section III.4.b.). Also, the BER found that Engineer A's opinions would potentially be based upon privileged, specialized, and confidential knowledge gained while he was retained by the U.S. Government (Code of Ethics, Section III.4.).

We respectfully disagree with the conclusion reached by our colleagues on the BER. When the entire Code of Ethics is considered, we find that Engineer B was not acting ethically when she appeared in an adversarial position to a former client.

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Our first concern is the point at which an Engineer becomes privy to specialized knowledge on behalf of a former client or employer that has confidential information concerning the business affairs or technical processes of a former client. Think of a continuum from zero knowledge on the left to total knowledge on the right. At what point on this continuum does the Engineer become privy to knowledge that meets the test of the Code of Ethics Sections III.4. and III.4.b.? In our opinion, it is after completion of the first engagement (or assignment). In the instant case, Engineer B had on several occasions been employed by SELCI, affording her several times to become privy to knowledge.

Secondly, we don't think it is relevant whether the parent company or a subsidiary hires Engineer B. Corporations utilize consolidated accounting, and shareholders own the entire enterprise regardless of the corporate structure. For purposes of the instant case, SELCI must be viewed as a single entity. Since SELCI retained Engineer B on several occasions, not just one ad-hoc assignment, they undoubtedly placed high value on her expertise and would have willingly provided her with access to information on the policies, procedures, and practices of the company to assist her in performing her work. In other words, Engineer B became privy to "confidential information concerning the business affairs or technical processes" of SELCI.

Thirdly, in evaluating this case, we think it is necessary to read the relevant parts of the Code of Ethics in total. This reading reveals that an Engineer considering appearing as an adversary of a former client must:

- Perform services only in areas of their competence.
- Act for each employer or clients as faithful agents or trustees.
- Disclose all known or potential conflicts of interest that could influence or appear to influence their judgment or the quality of their services.
- Not disclose, without consent, confidential information concerning the business affairs or technical processes of any present or former client.
- Without the consent of all interested parties, participate in or represent an adversary interest in connection with a specific project or proceeding in which the Engineer has gained particular specialized knowledge on behalf of a former client.

Engineer B's work for Consumer X would have to be in her area of competence, which would have been the same area she previously represented SELCI, and, as a faithful agent for SELCI, she would have been privy to inside information on policies, procedures, and practices that could only be gained by a faithful agent of the company. As such, Engineer B, under the Code of Ethics, Section III.4.b., has an obligation to SELCI to seek their approval prior to representing an adversary interest. SELCI, as a good corporate citizen, should not unduly withhold approval if in their opinion no conflict

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exists. Also, Engineer B, in our opinion, has a duty to Consumer X to fully disclose her previous representation of SELCI if she is granted approval from SELCI to represent Consumer X.

Finally, further reinforcing our position is that regulatory proceedings are not legal proceedings. As such, there is much more leeway in cross-examination of witnesses. Even though the original complaint may be very narrow, the scope could expand at the hearing, raising the chance of entering areas specifically relating to the work Engineer B did for SELCI.

Conclusion:

Respecting our colleagues' position, we must find that Engineer B has an ethical responsibility to seek the permission of SELCI to represent Consumer X in an adversary proceeding. SELCI has a responsibility to not unduly withhold permission if the proceeding does not represent a breach of loyalty earned during the several engagements of Engineer B with SELCI.

BOARD OF ETHICAL REVIEW
William J. Lhota, P.E., NSPE
Harold E. Williamson, P.E., NSPE
E. Dave Dorchester, P.E., NSPE, Chair

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